



Who's in Charge of Our Air?

# ENFORCING ENVIRONMENTAL QUALITY

By Greg Varhaug

**F**or more than 18 months now, Texas Commission on Environmental Quality and the U.S. Environmental Protection Agency have been in conflict. There are fears that relinquishing TCEQ's authority to EPA could mean jobs lost here in Texas, and these concerns are echoed on the campaign trail by our current Governor in his run for President. So what are the facts?

## THE FLEX-PERMIT CONTROVERSY

Texas could brag that the Texas Commission on Environmental Quality's flex-permitting program had eliminated "grandfathered" industrial facilities in Texas. Whereas other states have refineries and power plants that are grandfathered, operating practically without any regulation, Texas has had every emissions point in the state under some kind of regulation since the state legislature wrote the requirement into law in 2001. Many Texas companies volunteered to submit for flex-permits well before the law required them to do so.

Under the flex-permit plan, a permitted company could operate a large facility under an overall emissions cap. The company didn't have to account for emissions from each individual source, which is the norm under most federal regulations.

TCEQ was widely criticized for how they administered flex-permits. Critics charged that companies were allowed to write their own regulations, and that those regulations were unenforceable. Despite occasional disagreements with EPA, the flex-permit program proceeded smoothly from 1996 until late 2009. That's when EPA published its objections to Texas' flex-permit process in the Federal Register. EPA was also calling for proper enforcement of the Clean Air Act. Then, in December 2009, EPA published its endangerment finding for greenhouse gases (GHG).

Trouble started in May 2010, when EPA took the unprecedented step of telling the state of Texas that TCEQ could not issue an operating permit to a Corpus Christi refinery. This was only six months after EPA's GHG endangerment finding, and the same time that EPA issued new requirements for stationary sources of GHG.

TCEQ Chairman Bryan Shaw immediately called it "a blatant power grab." Governor Perry had a similar reaction, accusing the Obama administration of engineering a federal takeover of state powers.

The EPA action led to a wave of news stories, including the threat that refineries and power plants might be shut down. The federal government was accused of deliberately disrupting the Texas economy. TCEQ called



the EPA's action "arrogant." Industry was going to be driven out of Texas. The state was going to lose jobs. To hear them tell it, no one saw it coming. But no one who had followed the situation was surprised.

Just over a year later, on July 7, 2011, the EPA announced, as stated on its website, that all companies in Texas operating under the state's flex-permitting program had agreed to apply for updated air permits.

In its press release, EPA Regional Administrator Al Armendariz congratulated his agency for having made "significant progress with no disruptions, no job losses, and numerous commitments from companies to obtain Clean Air Act-compliant permits through a transparent process." He says that people all over Texas "will benefit from the hard work of EPA staff and these companies." Armendariz credited EPA for restoring "regulatory certainty" for

companies caught in the middle of this complex legal and technical maze.

## THE FOUR-STEP PROCESS

How was the flex-permit issue finally resolved? EPA negotiated with Texas companies to produce a four-step "agreed process for transitioning" into full compliance with all federal requirements. In these negotiations, EPA basically went around TCEQ.

The first step of the EPA process entails a commitment from companies to restructure their flex-permits. The permit holder agrees to add new terms and conditions that will allow for a transition to full federal compliance. This includes public comment, and a six-month interim report on their progress. The remaining steps are gathering information on emissions points, and other routine filings needed to apply for an updated permit.

If EPA's negotiations with flex-permit

holders sidestepped the TCEQ, the "Agreed Process" that resulted doesn't. The Agreed Process describes how the permit-holder, EPA, and TCEQ intend to transition to an updated permit. The process starts with the company notifying TCEQ (not EPA) of the added conditions. TCEQ receives public comments, and issues responses "in coordination with EPA." If the permit holder wants an extension, they ask TCEQ. If an extension is granted, TCEQ notifies EPA.

Even with litigation pending, the flex-permit issue appears to be resolved, at least from the standpoint of most of the affected businesses. But the problems between TCEQ and EPA are not over.

## CROSS-STATE AIR POLLUTION

The resolution of the flex-permit issue went almost unnoticed because it was announced one day after the EPA issued its Cross-State Air Pollution Rule (CSAPR). There is a "good-neighbor" provision to the Clean Air Act which says that an emission source from one state should not contribute to non-attainment of pollution standards by another state. EPA's website gives a state-by-state breakdown of how much each state contributes to air pollution in other states, based on their most recent data.

The response to the new CSAPR was immediate. Within a week, Southern Company and Duke Energy each reported plans to close some of their coal-fired power plants in the next few years. Energy Futures Holding Corp, based in Dallas, is threatening to close some of their plants as well. Recent statements in the press by the state's PUC are raising fears that power plant closings may lead to rolling blackouts across the state.

Some plants have since made alterations to their operations. Some are relying more on the coal scrubbers that have been installed at many coal plants. (Coal plants don't run scrubbers all the time because of the additional energy needed to operate them.) In combination with switching some burners to lower-sulfur coal, this is sometimes all that's needed to bring them into full federal compliance.

In September of this year, Energy Futures Corp, parent company of Luminant, filed a petition in the U.S. Court of Appeals for the D.C. Circuit, asking the court to "invalidate CSAPR as to Texas." The company claims that the EPA rules will force it to shut down two

coal-fired power plants in Texas.

Financial analysts have questioned the company's real motives. Some are expressing doubts that Luminant will follow through on the threat, attributing recent moves to a possible attempt to force their parent company's bond price to fall before a debt-refinance deal.

## MASSACHUSETTS VS. EPA

It's hard to view all this as just a power grab by the EPA. EPA didn't volunteer for this fight – they were drafted by the Roberts Court. In 2007, the U.S. Supreme Court handed down its decision in the case of *Massachusetts v. EPA*. Massachusetts, along with 11 other states and several cities, had sued the EPA to force the agency to regulate carbon dioxide, and five other air pollutants. Neither the EPA nor (at the time) the Bush administration wanted anything to do with regulating carbon dioxide.

The appeal hinged on the language in the Clean Air Act, not on the scientific validity of links between GHG and global warming. Chief Justice Roberts wrote a dissenting opinion in which he questioned some of the science presented in the case. It was widely reported as a court ruling on global warming. A good deal of scientific evidence was given, but the actual legal criteria were narrow. The court decided that CO<sub>2</sub> is a pollutant emitted by car tailpipes which might “endanger public health or welfare.” The state of Texas entered an amicus brief supporting the EPA position in the case.

The court also cited that EPA had no option but to enforce CO<sub>2</sub> regulation. EPA had repeatedly declined to enforce CO<sub>2</sub> regulations, prompting the initial lawsuit. EPA was checkmated. EPA could enforce the laws under the Clean Air Act, or else they themselves would be found in violation.

As a result of the Massachusetts decision, EPA was required to determine the relative dangers of GHG, then to enact regulations based on those determinations, if Congress then failed to enact its own regulations. The court ruled that EPA must provide a scientific basis for why it was not necessary to regulate greenhouse gases.

## CLEAN AIR LEGISLATION

Since then, Congress has moved several times to try to limit EPA's authority. In June 2010, a U.S. Senate resolution by Lisa Murkowski (R-AK)

would have taken authority for regulation of GHG away from EPA.

In the current congressional session, more than 10 bills were aimed at doing basically the same thing, although none has passed so far. House Majority Leader Eric Cantor's website lists CSAPR as number two on the “Top 10 Job-Destroying Regulations Republicans Are Moving to Repeal.”

On September 23, the House of Representatives passed its version of

the TRAIN Act, which would create a committee to conduct cost-benefit analysis of EPA measures. There's no word yet on when the Senate may take up the bill. But while Congress debates, EPA continues to implement its policies as planned.

The EPA plan includes a cap and trade mechanism, like the Clean Air Interstate Rule (CAIR) that CSAPR replaces, and like the SO<sub>2</sub> reduction scheme written into the 1990 Clean

## What is the Texas Commission on Environmental Quality?

The Texas Commission on Environmental Quality is the state agency tasked with issuing permits and enforcing environmental regulations for polluting businesses operating within the state. As of 2007, the TCEQ is also in charge of uranium mining and the processing of radioactive waste within the state.

When it was created as a successor to the Texas Natural Resource Conservation Commission in 2002, the TCEQ inherited several problems. Texas City had been named in 1999 as the city with the worst air pollution in the country, surpassing Los Angeles. TCEQ also inherited the Texas Qualified Facilities Program, a state-based environmental regulation plan which was submitted to the US Environmental Protection Agency in 1996, and which has been at the center of the flexible-permitting controversy. All flex-permits in Texas have been updated to comply with new EPA rules.

To address the problems of air pollution in Texas, TCEQ has pursued a number of innovative and proactive steps. The 2007 Texas legislature (SB12) included a low-income vehicle repair program. TCEQ's "Drive A Clean Machine" program offers cash to repair vehicles, and incentives to people driving older, dirtier-running cars to replace them with cleaner vehicles. SB12 also includes a clean bus program, and measures to find a "best alternative retrofit" for facilities with high pollution, plus a requirement that computer manufacturers create a recycling plan for their computers.

Air Act, which worked successfully. The idea is that states will set up cap and trade systems to allow for trading within that state. Each permit holder is given an initial allowance. Each state is given its own budget. California is on track to be the first to implement a state trading program, though there are still court challenges pending.

### BUDGET CUTS AT BOTH AGENCIES

Two percent of TCEQ's operating budget comes from general state revenue, 84 percent is generated from fees, 12 percent comes from federal funds.

The majority of fines collected by TCEQ go to the state's general revenue fund, and not directly to TCEQ.

TCEQ has a substantial operating budget: \$475M in 2010. And the agency actually appropriated over \$500M in 2010. TCEQ's 2012 budget, projected to be about \$355 million, is down about 30 percent from the amount appropriated in 2010. TCEQ says it will continue with programs like "Drive a Clean Machine," although the agency's website says some cuts will be necessary.

And TCEQ isn't the only state agency with environmental oversight

facing large budget cuts. Others include the Texas Railroad Commission, the Soil and Conservation Board, and the General Land Office, to name just a few.

Worries over budget cuts are affecting some projects. Earlier this year, the Eagle Pass City Council raised concerns over whether TCEQ will be able to effectively monitor the Dos Republicas Coal Partnership, whose pollution discharge permit is up for renewal. The City Council questioned whether TCEQ could be relied upon, in light of the cuts to their budget. After all, TCEQ was up for its "Sunset" review, and there was some fanciful discussion in the press about disbanding the agency altogether.

Will either EPA or TCEQ have the money to operate and to effectively regulate going forward? Facing proposed budget cuts of its own, of over \$1B in the upcoming federal budget, EPA is being targeted by conservatives for budget cuts specifically aimed at limiting the agency's power to regulate.

### POLLUTION COSTS

To many people, pollution control means higher costs, fewer jobs, and limited economic freedom for everyone. Many are unconvinced by claims of human health benefits from decreasing pollution, and many reject as "junk economics" attempts to monetize the supposed health benefits of reducing pollution. After all, poverty and unemployment are also unhealthy.

But pollution has already cost money and jobs to Houston and Dallas. A few years ago, Toyota built its plant in San Antonio instead of Houston, largely because of San Antonio's better air quality. Boeing moved to Chicago, instead of either Houston or Dallas, in part because of air quality concerns. These are only two famous cases.

The good news is that air quality has generally improved nationwide in the last 10 years. But the numbers tell a complicated story. Elena Craft, Ph.D., a health scientist from the Environmental Defense Fund's office in Austin, offers a perspective on Texas' pollution numbers: "On a scale of A to F, I would give Texas a C minus. The reason for that is if you look at the emissions reductions for a variety of pollutants, you'll see that Texas has rarely done better than average, compared to the average across the U.S."

What has driven this air quality improvement over the last decade? Government and the private sector together (mostly government) have focused on the problem of air pollution for over 30 years, starting with the Clean Air Act and Water Quality Acts in the 1960's, and later with Nixon's creation of the EPA. Elena Craft points to EPA engine standards, and specific pollution-reduction plans that were put in place across the country. In Texas, she cites consent decrees between facilities and EPA to reduce emissions, and she points to successful citizen actions.

## LITIGATION IS ONGOING

The flex-permit issue is far from resolved. TCEQ spokesperson Andrea Morrow stated in an e-mail, "Texas will proceed with its litigation (pending in 5th Circuit Court of Appeals) re: EPA's disapproval of Texas' Flexible Permit Program. The TCEQ is involved in ongoing litigation with EPA regarding flexible permits and other matters, and TCEQ continues to evaluate its options under any EPA actions."

Victor Flatt is a professor of environmental law at the UNC Chapel Hill School of Law, and a Distinguished Scholar of Carbon Trading and Carbon Markets, Global Energy Management Institute at the UH Bauer College of Business. Professor Flatt explained that one of the state's objections in the flex-permit suit is that they were not given sufficient administrative notice.

In reaction to CSAPR, Flatt explains, "Texas joined with 17 other

states to challenge EPA's endangerment finding for greenhouse gases, and that case has been consolidated with all other cases on the issue, including Texas' claim that the EPA should not have taken over the part of the State Implementation Program for greenhouse gases." While the matter is being decided, he says, Texas' requests for a stay were denied, so EPA's actions will go forward for now.

Rather than just a tectonic clash between two mammoth government

agencies, we're seeing an orderly transition by business and government to new scientific, regulatory, and economic realities. Meanwhile, the regulatory uncertainties, the localized economic setbacks, the lawsuits, and lambastes in the press are all just part of that process. **N**

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